

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARIE WALKER, CONSERVATOR OF THE
ESTATE AND PERSON OF JESSIE MAE GRANT

PLAINTIFF

VS.

NO. 1:97CV399-S-A

LOUISIANA EXTENDED HEALTH CARE CENTERS, INC.
D/B/A ATTALA COUNTY NURSING HOME

DEFENDANT

OPINION

Now before the court is defendant's motion to dismiss the above-styled action with prejudice at plaintiff's costs due to the running of the applicable statute of limitations. Plaintiff has filed no response, and the time for filing of responsive briefs pursuant to UNIF. LOC. R. 8(d) has now expired. Defendant argues that the applicable statute of limitations, found in Miss. Code Ann. § 15-1-49 (1972) (as amended by Laws, 1989), provides a three-year statute of limitations for actions of the present type accruing on or after July 1, 1989, and that, because plaintiff's claim accrued at the latest on March 19, 1993, the limitations period has run. The court has jurisdiction over the claim pursuant to 28 U.S.C. § 1332.

In accordance with the provisions of 28 U.S.C. § 636(c), both parties consented to have a United States magistrate judge conduct all the proceedings in this case, including an order for entry of a final judgment. Therefore, the undersigned has authority to decide the motion to dismiss. Having no objection or response from plaintiff on the record, and after reviewing the pleadings, briefs, and motions of the parties, the court is of the opinion that the motion is well taken and the case should be dismissed with prejudice.¹

¹If a court considers matters outside the pleadings in a motion to dismiss, then FED. R. CIV. P. 56 applies and the party against whom summary judgment is sought is entitled to 10 days notice and an opportunity to respond. *Fernandez-Montes v. Allied Pilots Association*, 987 F.2d

Defendant's motion is brought under FED. R. CIV. P. 12(b)(6) as a motion to dismiss for failure to state a claim upon which relief may be granted. *See Watts v. Graves*, 720 F.2d 1416, 1422 (5th Cir. 1983) (citations omitted). However, in order for such a motion to be granted, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ibid.* (citations omitted).

State statutes of limitations govern the filing of diversity jurisdiction lawsuits in federal district court. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *see also Vincent v. A.C. & S., Inc.*, 833 F.2d 553, 555 (5th Cir. 1987) (citations omitted). Miss. Code Ann. § 15-1-49 (1) states, "All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not thereafter." The statute applies to all pertinent actions accruing after July 1, 1989. Plaintiff alleges that the claim accrued on March 16, 1993. In its motion to dismiss, defendant suggests March 19, 1993, presents a more accurate date. The court is obligated to give the plaintiff the benefit of every doubt and, consequently, will utilize March 19, 1993, as the proper date in its calculations. Thus, the question becomes whether the three years allowed by Mississippi law elapsed, especially in view of the fact that there were times after March 19, 1993 when for one reason or another under Mississippi law the running of the three years was tolled.

Seven months and twenty-two days ticked off the clock between March 19, 1993, and November 10, 1993, the date plaintiff filed her original complaint in state court. The filing of the first lawsuit tolled the running of the statute at that time. *Watters v. Stripling*, 675 So.2d 1242,

278, 283 (5th Cir. 1993); *see also Underwood v. Hunter*, 604 F.2d 367, 368 (5th Cir. 1979). Defendant raised the defense of the statute of limitations in its answer. Additionally, a court may consider the pleadings, briefs, and motions of the parties without converting a motion to dismiss into a motion for summary judgment. *Fernandez-Montes*, 987 F.2d at 282 n.5.

1244 (Miss. 1996). The statute will stop tolling after a period of one hundred twenty days if service of process is not made upon the defendant during that time. *Ibid.* As of March 10, 1994, the plaintiff had failed to serve process upon the defendant and the statutory period began again to run. The plaintiff finally served defendant with process one year, five months and eighteen days later, on August 29, 1995. In order to view the matter in a light favorable to plaintiff, the court assumes that the three-year period would again be tolled upon service of process. Adding that year, five months, and eighteen days to the previous number of seven months and twenty-two days yields a total of 2 years, one month and ten days that elapsed of the three years allowed.

Upon being served, the defendant removed that action to federal court. The district court dismissed the action without prejudice on March 12, 1996. At that point, the three-year clock began running again. *Deposit National Bank v. Roberts*, 483 So. 2d 348, 352 (Miss. 1986). Plaintiff finally refiled her lawsuit in this court on December 10, 1997. However, in order to file before the three-year limit prescribed doing so, plaintiff must have filed on or before February 1, 1997. In other words, at the time her complaint was dismissed from federal court on March 12, 1996, plaintiff had ten months and twenty days in which to beat the statutory deadline. Even if the court accepts the defendant's invitation to allow the plaintiff a full year, until March 12, 1997, for refile, plaintiff did not refile until December 10, 1997. Clearly, the statute of limitations set forth in Miss. Code Ann. § 15-1-49 (1972) had expired. Nothing in the pleadings, motions, or briefs of the parties causes the court to doubt that plaintiff can prove no set of facts in support of her claim that would entitle her to relief and allow her to avoid the conclusion that she simply filed her complaint too late. Indeed, plaintiff never made an attempt to so persuade the court by filing a response to Defendant's motion to dismiss. Plaintiff's complaint must be

dismissed with prejudice.²

A final judgment in accordance with this opinion will issue this day.

This the 24th day of June, 1998.

UNITED STATES MAGISTRATE JUDGE

²In addition to filing the motion to dismiss with the court, defendant later filed a Motion [11-1] for “Order in the Nature of a Judgment as a Matter of Law.” This opinion and the attached final judgment renders the matter moot, but the court takes advantage of the opportunity to list other grounds upon which the complaint could easily have been dismissed.

Plaintiff has never responded to discovery requests. On February 4, 1998, defendant served upon plaintiff interrogatories, requests for production of documents, and requests for admissions. Plaintiff has never responded. It is not unreasonable to assume that future sanctions under FED. R. CIV. P. 37 would have been forthcoming to address this complete failure.

Additionally, plaintiff has failed to respond to any of defendant’s motions or request more time in which to do so. Indeed, it appears that plaintiff has disappeared from the litigation. Had the court not dismissed the claim under Rule 12(b)(6), dismissal under Rule 41(b) for failure to prosecute would have been a possible option.

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FINAL JUDGMENT

In accordance with the opinion issued this day, the instant cause is dismissed with prejudice pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted. All costs are taxed to Plaintiff.

IT IS SO ORDERED.

This the 24th day of June, 1998.

UNITED STATES MAGISTRATE JUDGE